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CPLR 4317(b): Equitable Distribution of Marital Assets Is Not a Proper Subject for a Compulsory Reference

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tion, the defendant could raise this jurisdictional objection after the statute of limitations had run and thereby deprive the plaintiff of an opportunity of bringing a timely action.³⁶

By issuing such a strong statement to practitioners, the *Addesso* court has furthered the purpose of CPLR 3211(e)'s mandate—promoting judicial efficiency in the disposition of issues. Additionally, the decision diminishes the likelihood that defendants will be able to cause unnecessary delays which could preclude plaintiffs from bringing meritorious claims.

Leanne Sinclair Jacobs

CPLR 4317(b): Equitable distribution of marital assets is not a proper subject for a compulsory reference

Article 43 of the CPLR enunciates the procedures governing a trial conducted by a referee¹ or a judicial hearing officer.² These

³⁶ See generally Siegel, *supra* note 23, at S-24, col. 1. In his article, Professor Siegel explains the interplay between defects in summons service, statutes of limitations, and *Markoff's* interpretation of CPLR 205(a) and how these three factors can affect a plaintiff's ability to pursue a cause of action. *Id.* The first factor is the dismissal of the action because of defective service—as was the case in *Addesso*. *Id.* The second factor occurs when the statute of limitations has already run at the time of such dismissal. *Id.* The third factor is the decision in *Markoff* holding that CPLR 205(a)'s six month extension of the statute of limitations does not apply when the action is dismissed due to lack of personal jurisdiction. *Id.* When these three factors occur together, the plaintiff is precluded from proceeding with the action. *Id.*

¹ CPLR art. 43 (McKinney 1963). The CPLR provides for three modes of trial practice: trial by jury, trial by a judge, and trial by a referee. See SIEGEL § 379, at 492. The authority of the courts to appoint a referee is contained in CPLR section 4001. CPLR 4001 (McKinney 1963). Only attorneys admitted to practice in New York may be designated as referees. CPLR 4312(1) (McKinney 1963). The referee must conduct a "trial in the same manner as a court trying an issue without a jury," CPLR 4318 (McKinney Supp. 1988), and the decision of the referee is accorded the same authority as the decision of a court. CPLR 4319 (McKinney 1963). See *Lipton v. Lipton*, 128 Misc. 2d 528, 534, 489 N.Y.S.2d 994, 999 (Sup. Ct. Nassau County 1985) (determination of referee or judicial hearing officer is as binding as supreme court justices'); *aff'd*, 119 App. Div. 2d 809, 501 N.Y.S.2d 437 (2d Dep't 1986) *Buxbaum v. Buxbaum*, 118 Misc. 2d 348, 350, 460 N.Y.S.2d 414, 416 (Sup. Ct. Spec. T. N.Y. County 1983) (decision of referee accorded same treatment as decision of justice of coordinate jurisdiction); 4 WK&M ¶ 4319.01, at 43-55 (1987) (referee's decision stands as a court decision).

² CPLR 4301 (McKinney Supp. 1987). A 1983 amendment to section 4301 provides that, for the purposes of article 43, the term "referee" shall include a "judicial hearing officer." Ch. 840, § 4, [1983] N.Y. Laws 1601. A judicial hearing officer is defined as a former

court-appointed assistants exercise broad powers ranging from the performance of ministerial acts to the reporting on or determination of an issue.³ The CPLR explicitly allows the parties to an action to stipulate to the determination of any issue by a referee.⁴ In addition, section 4317(b) enables a court to order a "compulsory reference,"⁵ without the consent of the parties, if the trial of an

judge who has retired or otherwise left the bench and is certified by the chief administrator as mentally and physically able to perform judicial duties. See CPLR 105 (McKinney Supp. 1988).

The judicial hearing officer was created in an attempt to implement proposals contained in the Report of the Committee to Utilize the Services of Retired Judges. See COMM. TO UTILIZE THE SERVICES OF RETIRED JUDGES REP., reprinted in *Amicus Curiae Brief* on behalf of the Chief Administrative Judge, at app. 'D' 1, 29 Schanback v. Schanback, 130 App. Div. 2d 332, 519 N.Y.S.2d 891 (2d Dep't 1987) [hereinafter COMMITTEE REPORT]. This Committee had been created to propose an efficient mechanism for utilizing the services of retired judges to relieve the court system of calendar congestion and delay. *Id.* at 1.

³ See CPLR 4001 (McKinney 1963). CPLR 4001 authorizes a referee "to determine an issue, perform an act, or inquire and report in any case where this power was heretofore exercised and as may be hereafter authorized by law." *Id.* The more specific powers and the actual procedures for appointment are found in articles 42 and 43 of the CPLR. If a referee performs a ministerial act, he possesses the same powers as the appointing court has in performing that function. See CPLR 4301 (McKinney Supp. 1987). In addition, a referee has the authority of the court when the reference involves the determination of an issue. *Id.* However, a reference to inquire and report only authorizes a referee to function in an advisory, rather than a determinative, capacity. See CPLR 4001, commentary at 59 (McKinney 1963). The final decision, utilizing the referee's report, is made by the appointing court. See *id.*

A referee's powers are not unlimited. See CPLR 4301 (McKinney Supp. 1987). A referee "shall have no power to relieve himself of his duties, to appoint a successor or to adjudge any person except a witness before him guilty of contempt." *Id.* Although a referee's authority to enforce decisions through contempt powers is limited, a trial referee functions in the same way as the court. See, e.g., *Simmons v. Benn*, 96 App. Div. 2d 507, 508, 464 N.Y.S.2d 811, 812 (2d Dep't 1983) (referee has power to raise issue of unclean hands *sua sponte*); *Kardanis v. Velis*, 90 App. Div. 2d 727, 727, 455 N.Y.S.2d 612, 613 (1st Dep't 1982) (trial referee decides matter of witness credibility). See also SIEGEL § 379, at 494 (referee has same powers as court carrying out similar function).

⁴ CPLR 4317(a) (McKinney 1963). See, e.g., *Sternberg v. Sternberg*, 88 App. Div. 2d 950, 950, 451 N.Y.S.2d 187, 188 (2d Dep't 1982) (parties may consent to hearing by referee); *Werner v. Jocelyn-Varn Oil Co.*, 30 App. Div. 2d 648, 649, 291 N.Y.S.2d 88, 90 (1st Dep't 1968) (parties may consent to appointment of referee).

The statute mandates that a reference to determine certain issues requires court leave even if the parties unanimously consent. CPLR 4317(a) (McKinney 1963). Approval of the court is needed in a matrimonial action, an action against a corporation to obtain a dissolution or to receive or distribute its property, and an action involving an infant defendant. *Id.*

⁵ See CPLR 4317(b) (McKinney 1963). Section 4317(b) provides that:

On motion of any party or on its own initiative, the court may order a reference to determine a cause of action or an issue where the trial will require the examination of a long account, including actions to foreclose mechanic's liens; or to determine an issue of damages separately triable and not requiring a trial by jury; or where otherwise authorized by law.

issue requires the "examination of a long account."⁶ Recently, in *Schanback v. Schanback*,⁷ the Appellate Division, Second Department, held that a compulsory reference to determine the economic issues in a matrimonial action was inappropriate since such an action does not require an "examination of a long account."⁸

In *Schanback*, the plaintiff commenced an action against her husband for a divorce on the ground of abandonment.⁹ The diverse marital property, accumulated over thirty years, encompassed mutual business enterprises, real estate holdings, investments and personal property.¹⁰ This property was to be divided through equitable distribution, and counsel for both parties estimated that a trial to determine the economic issues would last approximately four weeks.¹¹ Over the objections of both parties, the judge invoked the "long account" compulsory reference authorization of section 4317(b) and referred these issues to a judicial hearing officer for a determination.¹² After presiding over a month-long trial, the judicial hearing officer issued a written opinion which included a sum-

Id.

Compulsory reference has been utilized in a variety of actions. *See, e.g.,* *Belle v. Chronalloy Am. Corp.*, 51 App. Div. 2d 933, 933, 381 N.Y.S.2d 253, 253 (1st Dep't 1976) (defamation action); *Troster Singer & Co. v. Kessler*, 50 App. Div. 2d 539, 539, 375 N.Y.S.2d 331, 332 (1st Dep't 1975) (personal jurisdiction issue).

⁶ CPLR 4317(b) (McKinney 1963); *see also infra* notes 12 & 26 (description of issues involved in a long account). The "long account" case is the classic example of a compulsory reference. *See* SIEGEL § 379, at 493-94.

There is no constitutional barrier to the compulsory reference of a cause of action involving the examination of a long account because New York's first Constitution guaranteed a jury trial only in cases in which they had been used before; pre-constitution practice had allowed the compulsory reference of a long account. *See* *Steck v. Colorado Fuel & Iron Co.*, 142 N.Y. 236, 238, 37 N.E. 1, 2 (1894); *see also* SIEGEL §379, at 493-94 (compulsory reference of long account constitutional). Consequently, if a case involves a long account, the process of fact finding can be taken away from the jury without the consent of the parties and can be determined by an expert. *See* SIEGEL § 379, at 493-94.

⁷ 130 App. Div. 2d 332, 519 N.Y.S.2d 819 (2d Dep't 1987).

⁸ *Id.* at 343, 519 N.Y.S.2d at 825.

⁹ *See id.* at 334, 519 N.Y.S.2d at 819.

¹⁰ *See id.* at 335, 519 N.Y.S.2d at 820. These items included a multi-million dollar business enterprise, the marital residence, real estate interests in Florida, mortgages, limited partnerships' interests, stock and bond portfolios, pension plans, tax shelters, jewelry and furs. *Id.*

¹¹ *See id.* at 334, 519 N.Y.S.2d 820. The judge recommended that, in view of the length of time involved, the parties should agree to a reference of the economic issues. *Id.* Both parties refused to consent. *Id.*

¹² *See id.* The administrative judge stated that "an extended equitable distribution case is the classic case to go to a judicial hearing officer. It involves complex financial issues, listening to expert witnesses and multiple figures and is what the law envisions when the statutes were amended to include a judicial hearing officer as a referee." *Id.*

mary of the testimony and evidence presented, factual findings, and conclusions of law.¹³ Moreover, the opinion stated that the compulsory reference was proper and necessarily consistent with the "long account" requirement of the statute.¹⁴

The Appellate Division, Second Department, reversed, holding that "equitable distribution actions cannot be reasonably characterized as 'examination[s] of a long account.'"¹⁵ Writing for a unanimous panel, Justice Mollen noted the lack of statutory authority for compulsory reference of equitable distribution issues.¹⁶ After examining the equitable distribution law,¹⁷ Justice Mollen concluded that this statute compels the court to determine the value of marital assets which requires consideration of various intangible factors.¹⁸ Conversely, an examination of a long account was characterized by the court as traditionally limited to distinct matters involving tangible mathematical calculations.¹⁹ Consequently, equitable distribution of marital property requires the resolution of issues which are fundamentally different from those

¹³ See *id.*

¹⁴ See *id.* at 335-36, 519 N.Y.S.2d at 820-21. The judicial hearing officer stated that "[t]he use of Judicial Hearing Officers in matrimonial actions envisions long and detailed examination and cross-examination to determine valuations of both marital and separate property. Compulsory reference is necessary and proper where . . . the matter involves intricate and complex details of financial dealings, resources and equities." *Id.* at 336, 519 N.Y.S.2d at 821.

¹⁵ *Id.* at 343, 519 N.Y.S.2d at 825.

¹⁶ See *id.* The court deemed it significant that the legislature did not enact specific legislation to empower judicial hearing officers to hear and determine issues in matrimonial actions without the parties consent. See *id.* at 337-38, 519 N.Y.S.2d at 822. As additional support, the court relied upon the repeal of Judiciary Law section 116, which had specifically provided for compulsory references in matrimonial actions. *Id.*

¹⁷ See DRL § 236(B) (McKinney 1986). For matrimonial actions commenced on or after July 19, 1980, the concept of alimony has been replaced by equitable distribution provisions which provide for "maintenance" and a "distributive award." See Ch. 281, § 9, [1980] N.Y. Laws 448 (McKinney).

¹⁸ See *Schanback*, 130 App. Div. 2d at 342, 519 N.Y.S.2d at 825. The court noted that many provisions of the equitable distribution law require the exercise of a court's discretion beyond the rubric of the examination of a long account. See, e.g., DRL § 236(B)(1)(c), (d) (McKinney Supp. 1988) (deciding which assets are "marital" rather than "separate property"); *id.* § 236(B)(5)(d)(2) (McKinney 1986) (determining distribution of marital assets based on duration of marriage, age and health of both parties); *id.* § 236(B)(5)(d)(3) (McKinney 1986) (ascertaining need of custodial parent to occupy the marital residence); *id.* § 236(B)(5)(d)(11) (McKinney 1986) (wasteful dissipation of assets by either spouse); *id.* § 236(B)(5)(d)(10) (McKinney 1986) (tax consequences of each party); *id.* § 236(B)(6) (McKinney Supp. 1988) (intangible factors may be considered in fixing separate maintenance needs).

¹⁹ See *Schanback*, 130 App. Div. 2d at 343, 519 N.Y.S.2d at 825.

traditionally involved in the examination of a long account.²⁰

The *Schanback* court also rejected the Chief Administrative Judge's position²¹ that the Governor's statements,²² and the Committee Report on the Utilization of Retired Judges²³ supported the use of compulsory reference for resolution of equitable distribution issues.²⁴ Justice Mollen reasoned that these declarations only addressed the current legislative scheme which permits the judicial hearing officer to determine issues if the parties consent.²⁵ It is submitted that the *Schanback* court's failure to recognize the essential character of the issues involved in the equitable distribution of property, coupled with a lateral definition of a long account, caused the court to err in concluding that equitable distribution does not involve the examination of a long account. Limiting the scope of a long account to purely mathematical calculations is fundamentally flawed because it ignores precisely those kinds of issues

²⁰ *Id.* The court addressed the characterization of a marriage as an "economic partnership," see *O'Brien v. O'Brien*, 66 N.Y.2d 576, 585, 489 N.E.2d 712, 715, 498 N.Y.S.2d 743, 746 (1985), and found that the similarities between the "winding up" process in equitable distribution and those involved in business relationships are more apparent than real. See *Schanback*, 130 App. Div. 2d at 341, 519 N.Y.S.2d at 824. "Unlike an account for goods sold, work performed or money advances, the distributive award to which a spouse is entitled . . . cannot be determined by reference to a contractual or mathematical formula, but rather requires . . . the court's discretion." *Id.*

²¹ See Amicus Curiae Brief on behalf of the Chief Administrative Judge at 18, *Schanback v. Schanback*, 130 App. Div. 2d 332, 519 N.Y.S.2d 819 (2d Dep't 1987).

²² See Governor's Memorandum on Approval of ch. 840, N.Y. Laws (Aug. 4, 1983), reprinted in [1983] N.Y. Laws 2813 (McKinney). Governor Cuomo emphasized that, upon the amendment of the Judiciary Law, former judges and justices of the Unified Court System would be permitted to serve as judicial hearing officers "when such services are necessary to expedite the business of the courts A judicial hearing officer will be empowered to serve as a referee in civil matters, including matrimonial actions." See *id.*

²³ See COMMITTEE REPORT, *supra* note 2, at 11. In recommending the creation of the judicial officer position, the Committee noted that, "[b]urgeoning litigation and a chronic shortage of judges make it counterproductive to take up a judge's time in protracted fact-finding hearings. This is becoming even more compelling with the recent enactment of the law for equitable distribution of marital assets . . . which requires long accountings of marital assets" *Id.* The Committee concluded that the use of retired judges as state-paid judicial hearing officers provides the system with an efficient tool to ease the overburdened judicial system. See *id.* at 12.

²⁴ See *Schanback*, 130 App. Div. 2d at 343-44, 519 N.Y.S.2d at 826.

²⁵ *Id.* Consensual reference to a judicial hearing officer to hear and determine is provided for in CPLR 4317(a). However, court leave is required for a reference in a matrimonial action. See CPLR 4317(a). The *Schanback* court also noted that under "exceptional conditions" a reference to hear and report, as distinguished from an adjudication of an issue, could be done without the consent of the parties in a matrimonial action. See *Schanback*, 130 App. Div. 2d at 344, 519 N.Y.S.2d at 826. Non-consensual reference to hear and report is authorized by CPLR 4212. See CPLR 4212 (McKinney 1963).

which fall squarely within the broad, judicially-evolved definition of complex and intricate long account issues.²⁶ Just as a business dissolution may compel a long account of various valuation and ownership issues, so too may an equitable distribution of extensive business and property holdings.²⁷ As illustrated in *Schanback*, a husband and wife often find themselves involved in business relationships.²⁸ Consequently, it is suggested that a rule which allows a compulsory reference for unmarried business parties yet proscribes such reference when the business partners are married, manifests an inconsistent application of the law.

The underlying policy behind the creation of the judicial officer, alleviation of crowded court dockets,²⁹ has been severely impaired by the court's ruling in *Schanback*. It is submitted that, through narrowing of the long account definition, the court adopted a standard for compulsory reference which conflicts with legislative policy.³⁰ The elimination of compulsory reference of equitable distribution issues will eviscerate the full breadth of CPLR

²⁶ See, e.g., *Brooklyn Public Library v. City of New York*, 240 N.Y. 465, 468-69, 148 N.E. 637, 639 (1925) (long account issues subject to compulsory reference are "intricate or uncertain or subject to conflicting inferences"); *Cassidy v. McFarland*, 139 N.Y. 201, 206, 34 N.E. 893, 896 (1893) (long account requires actual contest as to correctness of different charges, conflicting proof and prolonged examination of witnesses for numerous litigated items); *Camp v. Ingersoll*, 86 N.Y. 433, 435 (1881) (an account is a long account if it is "made up of the dealings of the parties"); *Glass v. Thompson*, 51 App. Div. 2d 69, 76, 379 N.Y.S.2d 427, 434 (2d Dep't 1976) (purpose of compulsory reference of long account case is to remove complicated and intricate issues from court and jury). Historically, long accounts encompass issues that are so numerous and tedious that it would be impossible for a jury to resolve them within the reasonable time frame of a trial. See *Camp*, 86 N.Y. at 436.

²⁷ Cf. *O'Brien v. O'Brien*, 66 N.Y.2d 576, 585, 489 N.E.2d 712, 715, 498 N.Y.S.2d 743, 746 (characterization of a marriage as an "economic partnership"); DRL § 236, commentary at 12 (McKinney Supp. 1988) ("marriage is . . . an economic partnership").

²⁸ See *Schanback*, 130 App. Div. 2d at 335, 519 N.Y.S.2d at 820. See also *supra* note 10 and accompanying text (description of business and personal holdings).

²⁹ See COMMITTEE REPORT, *supra* note 2, at 1-2.

³⁰ See *id.* at 11. While the *Schanback* court addressed the Committee's purported purpose of judicial hearing officers, see *Schanback*, 130 App. Div. 2d at 344, 519 N.Y.S.2d at 826, the court failed to discuss the precise statement by the Committee that "equitable distribution . . . requires long accountings." See COMMITTEE REPORT, *supra* note 2, at 11 (emphasis added). When the legislature amended the Judiciary Law in 1983, to accomplish the goals of the Committee Report, it did so in light of the Committee's conclusion that equitable distribution actions fall within the rubric of long accounts. See *id.*

4317(b) and will hinder, rather than advance, the legislature's attempt at calendar relief.

Robert Joseph Rando

CRIMINAL PROCEDURE LAW

CPL § 270.35: Trial judges granted broad discretion to discharge juror who fails to appear at the trial two hours after scheduled time

Fundamental to our democratic system of jurisprudence is an accused's right to a trial by jury,¹ as recognized by the sixth and fourteenth amendments to the United States Constitution.² Inher-

¹ See *Dimick v. Schiedt*, 293 U.S. 474 (1935). "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Id.* at 486. See generally L. MOORE, *THE JURY, TOOL OF KINGS, PALLADIUM OF LIBERTY* (1973) (tracing development of jury from ancient Greece to Henry II of England to Revolutionary America); H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 3-20 (1966) (tradition and scope of Anglo-American criminal jury). "The right to jury trial is immemorial; it was brought from England to this country by colonists, and it has become a part of birthright of every free man." 47 AM. JUR. 2D *Jury* § 12, at 635 (1969). The Magna Carta has often been credited with guaranteeing trial by jury. See *Thompson v. Utah*, 170 U.S. 343 (1898). "When Magna Charta [sic] declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors." *Id.* at 349.

The right to trial by jury has had many staunch supporters, including Thomas Jefferson, who wrote: "Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative. The execution of the laws is more important than the making [of] them." Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), reprinted in 15 *THE PAPERS OF THOMAS JEFFERSON* 282, 283 (J. Boyd ed. 1958). See also *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968) (grant of jury trial for serious offenses essential for preventing miscarriages of justice and assuring fair trials). Despite overwhelming support, the jury trial concept has had its critics as well. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), overruled, *Duncan v. Louisiana*, 391 U.S. 145 (1968). In *Palko*, Justice Cardozo wrote, "[t]he right to trial by jury . . . [is] not of the very essence of a scheme of ordered liberty. To abolish [the jury] is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 325 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). See also *Duncan*, 391 U.S. at 188 (Harlan J. dissenting) (criticizing jury system as cumbersome); Lummus, *Civil Juries and the Law's Delay*, 12 B.U.L. REV. 487, 489 (1932) (jury system contributes to delay).

² See U.S. CONST. amends. VI, XIV. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed" *Id.* The right to trial by jury applies to nearly all criminal cases whether at the federal